No. 92

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members, *Petitioners*,

v.

CUTTER LABORATORIES, a Corporation, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENT

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Respondent.

PRELIMINARY STATEMENT

This case is one of major interest and importance to industry generally because, stripped of its technicalities, it involves broadly the right of an employer to protect his business against Communist entry and infiltration, and in doing so to refuse to employ Communists and to discharge those discovered in his organization.

Cutter Laboratories discharged Mrs. Doris Walker, a clerk-typist in its purchasing department, on convincing proof that she was a member of the Communist Party working actively on its behalf in the plant and the union. She had applied for and obtained clerical employment at Cutter Laboratories in 1946. The company later learned that she had concealed that she was a graduate of college and law school with high honors, a member of the bar, a former OPA enforcement attorney, and a former practicing attorney who had left that profession to devote herself to the Communist Party's program of infiltrating and gaining control of labor unions.

Within six months after obtaining employment at Cutter she was elected shop chairman and member of the executive committee of the union, Bio-Lab Local 225 of the United Office and Professional Workers of America. She became chief shop steward handling grievances throughout the plant in 1948, and local union president early in 1949. The company discharged her on October 6, 1949, after obtaining full evidence of her Communist membership and activities. Shortly thereafter the union itself was expelled by CIO for Communist domination.

The union subsequently took up her discharge as a grievance and carried it to arbitration under the con-

tract, contending that she was discharged for union activity. The company contended that it discharged her for Communist membership and activity and for fraud and concealment in her application for employment.

The company's right to discharge for the reasons given by it was not questioned by the arbitrators. A majority of the arbitrators, however, ruled that the company had waived this right by "unjustifiable failure" to discharge her when suspicion of her Communism was first aroused in 1947. In their view the employer tried to "carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use", and ultimately discharged Mrs. Walker at the height of collective bargaining negotiations in which she was participating as union president and negotiator, when it would do the union the most harm. They reasoned that "the discharge of a top union official and negotiator at a passionate climax in the middle of a stubbornly contested wage negotiation, standing alone, raises an inference that the discharge is retaliatory in nature and designed to restrain, coerce or interfere with the employee because of lawful union activity." They so found and ordered the company to reinstate her.

The company refused, and the union sought enforcement of the arbitration award in the California courts. Two lower courts felt that under prior decisions of the State Supreme Court they were bound by the arbitrators' finding and had no choice but to order reinstatement. The California Supreme Court, however, refused to lend its powers to aid the Communist Party, and it denied enforcement of the reinstatement award. The union, which has prosecuted the suit in its name

in behalf of Mrs. Walker, asks this Court to reverse the California Supreme Court and compel her reinstatement.

ARGUMENT

1. Communist Activity Cannot be Genuine Union Activity, and the Arbitrators' Contrary Ruling Therefore Involved an Impossibility and Exceeded Their Powers and Jurisdiction.

The issue before the arbitration board was whether Mrs. Walker was discharged "without just cause" in violation of a collective bargaining agreement. The company contended it discharged her for proven Communist membership and activity, and fraud and misrepresentation. The union contended that the company discharged her for union activity, in violation of its contractual agreement not to interfere with "lawful activity in the union", and therefore without just cause.

The parties were talking about the same activity; they differed only as to whether it was Communist activity or union activity. As the union put it in its argument before the arbitrators, the charge of Communism was "levelled at her as the accepted and acknowledged leader of the union" and "cannot be severed from her union activities" (R. 25). Thus it was recognized throughout that her activity was one and inseverable—it was not possible to divide it and label one part Communist and the other union. The coincidence is not of two activities, but of one activity carried on by Mrs. Walker to be furthered by dual means, i.e., as a member of the Communist Party infiltrating a union and as a union officer, a position of trust which resulted from her initial success and thereafter contributed to the further success of her infiltration efforts.

The arbitrators did not question Mrs. Walker's Communist membership and activity, or that this constituted just cause for discharge. They found that the company honestly believed that she was a Communist "with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail" (R. 29). They found that the accuracy of the company's belief of her Communism was "established in the record . . . by undenied and uncontroverted evidence" (R. 29). Moreover, the arbitrators deemed the evidence so conclusive that when the company sought to require Mrs. Walker to testify whether or not her purpose at the Cutter plant was "to carry on more effectively and more actively the program and activities of the Communist Party", they refused to require her to answer on the ground that such evidence "would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary" (R. 29).[1]

In their subsequent opinion and award, however, the majority arbitrators assumed without discussion that this very activity—infiltration and use of the union for purposes of the Communist Party—was lawful activity in the union and thus was protected by the contract. This, it is submitted, is not a mere error of fact or law immune from review; it involves an impossibility as the very basis of the award. In undertaking to make an award based on an impossibility the arbitrators exceeded their powers and acted without jurisdiction.

[1] One arbitrator, dissenting from the award, charged that this exclusion of direct evidence of the true nature of Mrs. Walker's activity denied the employer a full and fair hearing (R. 38). If this charge is correct, the award clearly should be set aside under the California arbitration statute.

Communist activity and bona fide union activity are, it is submitted, mutually inconsistent, mutually incompatible, and mutually exclusive. The same activity cannot be both, in logic or in law. To unions, collective bargaining and settlement of grievances are primary objectives. To the Communist Party and its adherents, grievances are "sparks which can be developed into roaring flames of strike" and collective bargaining is "an anathema". *A Handbook for Americans,* U. S. Senate Judiciary Subcommittee on Internal Security, 84th Congress, 1st Session, Committee Print, December, 1955, pp. 53, 98.

A union and the representatives through whom it acts must represent employees in good faith and "there must be no ulterior purpose". *Bausch and Lomb Optical Co.*, 108 NLRB 1555, 1559 (1954). A union and its agents owe complete loyalty to the employees they represent and must act always with complete good faith and honesty of purpose. *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953). Communism, on the other hand, necessarily implies complete dedication and absolute loyalty to the Party, and complete adherence to its policies and instructions. "From established policy it tolerates no deviation and no debate." *Dennis* v. *United States,* 341 U.S. 494, 564 (1951).

It is apparent that Mrs. Walker's activity could not, except in superficial appearance, meet any of the tests of union activity. It is not necessary to speculate as to her motive. She has herself declared it in her undenied, handwritten, signed report to the state headquarters of the Communist Party explaining certain action she had taken in a labor matter shortly before coming to Cutter. "*I tried to evaluate my action*", she wrote, "*as I try to evaluate everything I do, from the point*

of view of the welfare of the working class and the strengthening of the Party" (Co. Ex. 6 in arbitration, Ex. C and D to affidavit in Superior Court, R. 72-73, 390).

There could be no clearer example of Communist infiltration and misuse of unionism than the activity for which Mrs. Walker was discharged in this case. The purpose of such activity, as this Court has stated, is "not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device" *American Communications Association* v. *Douds,* 339 U.S. 382, 389 (1950), and to utilize this device, among other ways, as a means to "compel employers to accept and retain its members." *Dennis* v. *United States, supra,* 564.

Accordingly, it is submitted, a union official or negotiator who is a Communist and therefore has given his complete loyalty to the Party, renouncing all other loyalties, cannot engage in genuine union activity. Therefore, the arbitrators' finding that the discharge was for union activity was premised on an inherent impossibility. For the courts to accept and enforce it would be to stultify themselves. This they are not required to do. Even a finding of Congress falls when it is shown "to involve an impossibility," as stated by Mr. Justice Holmes in *Old Dominion Co.* v. *United States,* 269 U.S. 55, 66 (1925), even though findings of the legislative branch are entitled to utmost deference and respect from the judicial branch under our system of government.

The California arbitration statute directs the state courts to vacate arbitration awards "where the arbitrators exceeded their powers." Cal. Code Civ. Proc.,

Sec. 1288. The question submitted to the arbitrators in this case was whether the discharge was for union activity. They found that it was. As has been demonstrated above, however, this finding was necessarily premised on an impossibility. The arbitrators were not empowered to find an impossibility, therefore, in doing so, they exceeded their powers and acted without jurisdiction. Accordingly, their award was properly vacated by the California Supreme Court and its judgment should be affirmed.

2. If the Federal Government Has Preempted the Field as Contended by the Petitioner, the Arbitrators had No Jurisdiction and Their Award Should be Set Aside.

The union's preemption argument contends that the California Supreme Court's denial of reinstatement, after the arbitrators had found that Mrs. Walker was discharged for union activity, violates the national law and policy protecting union activity. This contention is based on the sound proposition that discharge of an employee for protected union activity, as charged by the union and found by the arbitrators in this case, is an unfair labor practice under federal law. The argument, however, proves too much. Under decisions of this Court, the National Labor Relations Board has exclusive jurisdiction of matters constituting unfair labor practices under the federal law. *Garner* v. *Teamsters Union,* 346 U.S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468 (1955). The parties could not deprive the Board of its jurisdiction, nor could they confer concurrent jurisdiction upon arbitrators, for then the Board's jurisdiction would no longer be exclusive, and the remedies might conflict. As stated in the *Garner* case, *supra,* "A multiplicity of tribunals and a diversity of procedures are quite as apt to pro-

duce incompatible or conflicting adjudications as are different rules of substantive law." 346 U.S. at 490-491. Under the union's theory, therefore, the arbitrators had no jurisdiction[2] and the judgment of the California Supreme Court setting aside the award should be affirmed.

3. Reinstatement in This Case Would Constitute Specific Performance Contrary to All Principles of Equity, and Was Therefore Properly Denied by the California Supreme Court.

Whether the relief sought here is viewed as performance of the contract provision that an employee discharged without just cause "shall be reinstated", or as performance of the arbitration award (itself a creature of the contract) enforcing that provision, it is in either event *specific performance.*

Even aside from the reluctance of courts to order specific performance of contracts for personal services, this case exemplifies virtually every reason known to

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[2] At least one federal district court has drawn this conclusion from this Court's decisions and has denied specific performance of a reinstatement award of arbitrators on this ground, reasoning that where the conduct alleged would constitute an unfair labor practice under the federal Act "the Board's exclusive jurisdiction cannot be displaced by proceedings before a privately constituted arbitration board, NLRB v. International Union, 7 Cir., 194 F. 2d 698, 702; NLRB v. Walt Disney Productions, 9 Cir., 146 F. 2d 44, 48. This is true even when the same act which is alleged to be an unfair labor practice is also alleged to be a violation of a provision of the contract. Otherwise the parties by writing into their agreement a ban upon the unfair practices enumerated in § 158, together with a provision for arbitration of all disputes involving alleged breaches of the contract could deprive the Board of all jurisdiction over unfair labor practice charges during the term of the contract. This would clearly violate § 160(a)." *United Electrical Workers* v. *Worthington Corp.*, 136 F. Supp. 31, 33 (D. C. Mass. 1955).

equity for denying specific performance. The former employee whose reinstatement is sought and whose rights in connection with her former employment are alleged to be infringed, admittedly obtained that employment by deliberate, intentional, fraudulent misrepresentation.[3] She comes into court with unclean hands, as does also the union which harbored her as its president at the time of her discharge and which has initiated and prosecuted the present case in her behalf.

Even the parent labor organization which has filed a brief as *amicus curiae* is in the untenable position of protesting in one breath that it washed its hands of Mrs. Walker by expelling the union which harbored her, and demanding in the next breath that the courts compel the company to harbor her and thus to do the very thing it once considered so reprehensible in its affiliate.

The only real benefit she would obtain from reinstatement would be the opportunity to resume and continue her activity on behalf of the Communist Party among Cutter employees and their union. The employer, on the other hand, would suffer undue hardship if compelled to reinstate an active Communist, for its business of manufacturing drugs, serums, vaccines and pharmaceuticals for human use is peculiarly sensitive, not only to sabotage but also to adverse effects of public and customer opinion founded on even the slightest suspicion of possible sabotage. Alteration of product

[3] The arbitrators found that "Doris Walker admits that she made the omissions and falsifications intentionally for the purpose of deceiving the Company because it was her information and belief that if she answered the questions truthfully the Company would not employ her" (R. 17).

control records and test records could be more difficult to detect and could have more serious consequences than adulteration of the products themselves (R. 328, 329). The company has a high duty to the public. As the California court stated, the company had "not only the right . . . but also the duty" to discharge Mrs. Walker.

Furthermore, Mrs. Walker's Communist affiliation would constitute good cause for immediate discharge even if she were reinstated—cause which the California Supreme Court has said cannot be waived under the law of that state. As the California Supreme Court added, the employer's "entirely adequate ground for refusing to employ her (whether by original refusal to hire or by discharge) *was a continuing one which was available to the employer at any time during its existence*" (R. 488, emphasis added). Accordingly, a decree of reinstatement would be inequitable and unconscionable if it prevented her immediate discharge after such reinstatement and, on the other hand, would be futile if it did not. Either alternative is objectionable to equity.

To avoid these established equitable principles, the union contends that under California statutes the state courts are compelled to grant specific performance of arbitration awards, and that refusal to do so is a denial of due process and equal protection of the laws, in violation of the Fourteenth Amendment to the federal Constitution.

It needs no argument that the granting of specific performance is an exercise of equity jurisdiction and that it remains so even where the formal separation of courts of law and equity is no longer observed and both

powers are conferred upon and exercised by the same court. 19 Am. Jur., Equity, Sec. 7.

It likewise needs no argument that the granting of the remedy of specific performance has traditionally rested in the discretion of the courts, and that this tradition was established in our jurisprudence long before the adoption of the Constitution and was embraced in its concepts of due process and equal protection. Whether a California statutory provision authorizing judicial confirmation of arbitration awards in that state repeals this traditional discretion of courts of equity and compels them to grant specific performance in all cases, is for the California courts to decide. The Supreme Court of California has decided it in the negative in the present case. Even if a federal question were involved, this decision is in accord with principles stated by this Court.[4]

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[4] "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

". . . We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'an appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity' . . . The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied . . ." *Hecht Company* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

In accord with these principles and with the California ruling is the decision of the Appellate Division, New York Supreme Court, in *Publishers Assn. of N. Y. City* v. *Newspaper and Mail Deliverers Union*, 280 App. Div. 500, 114 N.Y.S. 2d 401, 18 LA 855 (1952). Holding that the New York arbitration statute, which is similar to the one involved here, does not deprive the courts of their traditional discretion, the court stated that it "will not lend its power to the enforcement of the kind of a decision in arbitration which it would neither allow nor enforce as the subject of an action maintained before it directly".

Also in accord is arbitration's eminent friend and spokesman, Dean Wesley A. Sturges, Chairman of the Board of American Arbitration Association and author of Commercial Arbitration and Awards. In a recently published Symposium on Commercial Arbitration he has stated:

> "Only when an award is rendered which requires the employer to hire or the employee to work will an issue of specific performance of the employment contract emerge and *then may the courts readily and properly exercise their equitable discretion to refuse specific enforcement of the award.*" (emphasis added). Sturges and Murphy, 17 Law and Contemporary Problems 618 (Duke University, 1952).

The lack of substance in the petitioner's contentions appears even more clearly by comparison with the situation that would have existed if there had been no arbitration provision in the present contract and suit had been brought directly in court for enforcement of the contract and reinstatement of Mrs. Walker. The California statute applicable in that event provides:

> "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this state." Cal. Labor Code, Sec. 1126.

Clearly, under this statute, the supposed suit would have been one for specific performance and a court of equity would have applied the usual equitable doctrines in determining whether to grant the requested relief. It is equally clear that if the court had denied specific performance, i.e., reinstatement, because of the plaintiff's fraud, misrepresentation and unclean hands, no question of due process or equal protection would be involved. The only difference in the present case is the intervention of arbitration proceedings and award prior to the suit seeking a court decree of specific performance.

It is submitted that nothing in the due process or equal protection clauses of the Fourteenth Amendment requires state courts of equity to abandon their traditional powers and discretion with respect to specific performance merely because of the intervention of arbitration proceedings. Accordingly, it is submitted, the judgment of the California Supreme Court was a proper exercise of state equity powers and should be upheld.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the California Supreme Court is correct and should be upheld by this Court.

Respectfully submitted,

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